75-1700
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Supreme Court, U. S.
FILED
MAY 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1700

DR. SCOTT SMART, *Petitioner*,

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
214 823-2305

Counsel for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO._____

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v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. Scott Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 14, 1976.

OPINION BELOW

A Three-Judge Court entered an order of dismissal for Respondents on December 13, 1974. The Supreme Court of the United States on May 12, 1975 vacated the order of the Three-Judge Court who entered a new order of dismissal on June 17, 1975 which was essentially identical to

the original order of dismissal. The United States Court of Appeals for the Fifth Circuit affirmed the order of dismissal on January 14, 1976, *Smart* v. *Texas Power and Light Company*, 525 F.2d 1211 (1976).

JURISDICTION

Jurisdiction is founded upon the Fifth and Fourteenth Amendments to the United States Constitution; diversity of citizenship; Title 28 U.S.C. Sections 1331, 1332, 1343, 2201, 2281, 2283, 2284, 42 U.S.C. Sections 1983 and 1988.

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 14, 1976. A timely petition for rehearing en banc was denied on February 25, 1976 and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Article 1254(1).

QUESTIONS PRESENTED

1. May a landowner's right to "just compensation" pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States be defeated on procedural grounds?

2. Does a plaintiff who meets the statutory requirements of diversity jurisdiction have standing to sue in federal court?

STATEMENT OF THE CASE

Petitioner, Dr. Scott Smart, is a California resident and Plaintiff in the District Court. Respondents are Texas residents and Defendants in the District Court.

The Fifth Circuit correctly found that Dr. Smart is the owner of an undivided one-quarter interest in property subject to condemnation on proceedings still pending in a

Texas state court. It was uncontroverted that the amount in controversy exceeded $10,000.00 and the Plaintiff is a California resident and all Defendants are Texas residents. Defendant Texas Power and Light Company took possession of Dr. Smart's property in 1970 and is still in possession of his property although there has never been a Texas state court judicial proceeding vesting title in Texas Power and Light Company. Texas Power and Light Company has actual notice of Dr. Smart's property interest through this suit filed in federal court February 26, 1974. The company has not sought to make Dr. Scott Smart a party to that state court proceeding.

The Three-Judge District Court and the Fifth Circuit found Dr. Smart has no standing in federal court because he had no right to take part in the state court condemnation proceeding. The Fifth Circuit and District Court held that Dr. Smart had to give Texas Power and Light Company notice of his property interest in order to take part in the Texas state court proceeding.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS A LANDMARK CASE IN EXPROPRIATING PETITIONER OF HIS PROPERTY WITHOUT MEETING THE CONSTITUTIONAL REQUIREMENTS OF "JUST COMPENSATION" AS MANDATED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

It is uncontroverted that Dr. Scott Smart's land has been taken by Texas Power and Light Company and that he has not received any compensation. The Three-Judge Court, which was affirmed by the Fifth Circuit, found that Dr. Smart did not have standing in federal court because

he had not given notice to Texas Power and Light Company of his property interest. Neither court was able to furnish any authority for this proposition that a landowner in Texas must give a condemnor notice of his property interest in order to protect that interest. This is contrary to Texas law as acknowledged by the Attorney General of the State of Texas in his brief before this Court on appeal from the District Court at page 6:

> "Under Texas law, the party exercising the power of eminent domain proceeds to use that power against the owners and claimants of a property at its own risk."

The law in Texas is that a landowner must be given notice, *Houston* v. *Kunze*, 262 S.W.2d 947. It has never been Texas law that a landowner must give notice to a condemnor.

The effect of the dismissal for want of standing constitutes an adjudication that Dr. Scott Smart may be expropriated of his property without just compensation as he is denied access to the federal courts and the opinion also deprives him of access to the state courts as the holding states that Dr. Smart has no right to take part in the state court proceeding because Texas Power and Light Company did not have knowledge of his property interest.

Dr. Scott Smart acquired his property interest nine months before Texas Power and Light Company initiated condemnation. Only when every person having an interest in the property is compensated as an owner is the constitutional mandate fulfilled, *Houston North Shore Co.* v. *Tyrrell*, 98 S.W.2d 786, 793 (Tex. Sup. Ct. 1936).

This dismissal adjudicates on procedural grounds that Dr. Smart may be expropriated without just compensation

which is contrary to the plain language of the Fifth and Fourteenth Amendments to the Constitution of the United States. "Just compensation" means perfect equivalent in money of property taken, *U.S. v. Miller*, Cal., 63 S.Ct. 276, 279; 317 U.S. 369; 147 A.L.R. 55; and 87 L.Ed. 336. The holding of the lower court is clearly unconstitutional in denying Petitioner "just compensation" and is contrary to settled Texas law that a condemnor proceeds at his own risk at all times.

2. MAY A PLAINTIFF WHO MEETS ALL THE STATUTORY REQUIREMENTS OF DIVERSITY JURISDICTION BE REFUSED ACCESS TO FEDERAL COURT?

This is a recurring problem for litigants seeking access to federal court as to whether diversity of citizenship entitles them to that access. It is common knowledge that federal courts are seeking to reduce their workload. Chief Justice Burger has pleaded for Congress to eliminate diversity of citizenship jurisdiction, Burger, Chief Justice, "Annual Report on the State of the Judiciary," 62 A.B.A.J. 443, 444, Par. 2 (April 1976). If in fact this a legislative question whether federal courts take jurisdiction of diversity of citizenship cases, then Petitioner is entitled to federal court jurisdiction as a matter of right. Since the lower court has held Petitioner did not have any right to participate in the state court proceeding, the question of abstention does not arise. There is nothing mystical about eminent domain and a state's power of eminent domain no more justifies abstention than the fact that it involves any other issue relating to sovereignty and the federal courts have been adjudicating cases involving issues of state eminent domain for many years, *County of Allegheny* v. *Frank Mashuda Company*, 360 U.S. 185, 3 L.Ed. 2d 1163, 79 S.Ct. 1060.

It is uncontroverted that Petitioner has met the amount in controversy and diversity of citizenship requirements for federal court jurisdiction. The Bar is confused as to whether federal courts will take jurisdiction in such a clear-cut case of diversity jurisdiction and needs guidance. The lower court ignored the question of diversity jurisdiction. If an act of Congress is necessary to eliminate diversity jursdiction, then Petitioner has a right to federal court jurisdiction as a matter of law.

CONCLUSION

Petitioner's property has been expropriated without receiving any compensation contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. This is a landmark case in that the expropriation is justified on a procedural basis. Petitioner has federal court standing to sue because he has met the diversity of citizenship requirement and amount in controversy.

This case presents a procedural loophole for denying a landowner "just compensation." It is of national significance and therefore writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

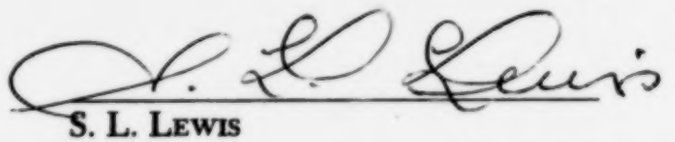
Respectfully submitted,



S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
214 823-2305

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari 3 copies on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on May 19, 1976, addressed to Robert E. Burns, Attorney for Texas Power and Light Company, 1522 Fidelity Union Life Building, Dallas, Texas 75201, and David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents.



S. L. LEWIS

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1700

DR. DON M. SMART, *Petitioner*,

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents*.

I

ADDENDUM OF EXHIBITS OF JUDGMENT OF THE DISTRICT COURT, COURT OF APPEALS, FIFTH CIRCUIT AND ORDER DISPOSING OF PETITION FOR REHEARING

S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
(214) 823-2305

DON M. SMART
10611 Garland Road
Dallas, Texas 75218
(214) 328-5401

Counsel for Petitioner

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DR. DON M. SMART VS. TEXAS POWER AND LIGHT COMPANY, ET AL	CIVIL ACTION NO. 3-6231-F

ORDER

This is a case in which the Plaintiff-landowner challenges the Texas statute[1] which permits privately owned utility companies such as the Defendant to exercise the right of eminent domain. The case is before the Court on the Defendant's Motion to Dismiss and the Plaintiff's Motion for Summary Judgment. I have concluded that the case must be dismissed and the Plaintiff's Motion denied.

The pleadings before the Court reflect that in 1970 the Defendant utility company began condemnation proceedings in state court involving certain tracts of land in Collin County, Texas. Three court-appointed commissioners determined that the value of the land was $34,000. The Defendant took possession of the land and built a power transmission line across it. The Plaintiff's appeal is still pending in the state court.

---

[1] TEX. REV. CIV. STAT. ANN. art. 1436: "Such corporation shall have the right and power to . . . condemn and appropriate the lands . . . and property of any person . . . "

Among several other grounds, the Defendant insists that this case must be dismissed because the landowner, Dr. Smart, withdrew all or part of the funds that were paid into the registry of the state court.

The Supreme Court of Texas wrote in State vs. Jackson, 338 S.W.2d 924, 925 (1965):

> After an award has been made, and the money deposited in the registry of the Court and the landowner has withdrawn the same, he cannot thereafter contend that the taking was unlawful. In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

The Texas decision in *Jackson* is consistent with the decision of the Supreme Court of the United States in Winslow vs. Baltimore & O.R. Co., 208 U.S. 59 (1908), in which the condemnor was a railroad. The Court held that by accepting the sum awarded in the condemnation proceedings, the landowners lost their right to assert that the condemnation petition was not maintainable.

I believe that the cited decisions require the dismissal of this case.

Accordingly, it is ORDERED that the Plaintiff's Motion for Summary Judgment be in all things denied and that the Defendant's Motion to Dismiss be granted.

ROBERT W. PORTER
United States District Judge

May 7th, 1975

Dr. Don M. SMART,
Plaintiff-Appellant,

v.

TEXAS POWER AND LIGHT COMPANY et. al.,
Defendants-Appellees.

No. 75-2874
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

Power company took an easement over property for electrical transmission lines under the Texas "quick taking" condemnation statutes, and property owner then filed suit challenging the constitutionality of that condemnation law provision which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking is unlawful. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., dismissed the suit, and plaintiff appealed. The Court of Appeals held that the irrebuttable presumption of legal consent to the taking of the condemnee's property on withdrawal of the deposited funds is not unconstitutional.

Affirmed.

See also, 5 Cir., — F.2d. —.

*Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

1. Eminent Domain 167(2)

Irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

2. Eminent Domain 247(2)

Under Texas law, interest computed from the day of the "quick taking" is a proper element of the final condemnation award. Vernon's Ann. Tex.Civ.St. art. 3265.

3. Constitutional Law 281

The necessities and expediency surrounding the taking of property is a legislative rather than a judicial question and, therefore, "quick taking" without a prior hearing is consistent with due process. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

4. Constitutional Law 281

Even when a condemnee accepts the award and is thus foreclosed from challenging the validity of "quick taking" condemnation, he may pursue his due process right to receive just compensation. Vernon's Ann.Tex.Civ.St. arts. 3264-3271.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff-appellant challenges the constitutionality of that provision of the Texas "quick taking" condemnation law

which forecloses a landowner who withdraws the money deposited in the registry of the court from thereafter contending that the taking was unlawful. Holding such law to be constitutional, we affirm the dismissal of plaintiff's other constitutional contentions and assertions of invalidity in the taking of his property.

The Texas Power and Light Company took an easement over plaintiff's property for electrical transmission lines under the Texas "quick taking" condemnation statutes, making the required deposit in court of the amount of the award set by the condemnation commissioners. Vernon's Tex.Rev.Civ.Stat.Ann. Arts. 3264-3271. With the state court condemnation suit still pending, the plaintiff brought this action in federal court challenging the constitutionality of the Texas proceedings. Specifically, plaintiff challenges the constitutionality of: first, the "quick taking" provisions of the Texas eminent domain statutes; second, the statutory delegation of eminent domain power to private corporations; and third, the Texas decision of *State v. Jackson*, 388 S.W.2d 924 (Tex.Sup.Ct.1965) which holds that withdrawal by a condemnee of the money paid into the court on quick taking forecloses a legal challenge to the validity of the taking and limits further litigation to the amount of the award.

Since plaintiff took down the funds deposited in the registry of the Texas court, the key to his right to challenge the validity of the taking lies in his attempt to overcome the effect of Texas law that

> In legal contemplation, he has consented to such taking and will not be permitted to retain his compensation

> and at the same time assert that the condemning authority had no right to take his property under the eminent domain power.

State v. Jackson, 338 S.W.2d at 925.

[1] *State v. Jackson's* irrebuttable presumption of legal consent to the taking of a condemnee's property on withdrawal of the deposited funds is not unconstitutional. The eminent domain provisions assure adequate notice to the landowner. By refusing to withdraw the award money, the condemnee may receive a hearing on the validity of the condemnation before a Texas district court, which has authority to grant injunctive relief. Vernon's Tex.Rev. Civ.Stat.Ann. Art. 3269. The United States Supreme Court has approved a similar federal eminent domain procedure (applied in a different context) specifically rejecting asserted Fifth Amendment deficiencies as to notice and hearing. *United States v. Miller*, 317 U.S. 369, 382, 63 S.Ct. 276, 87 L.Ed. 336 (1943). See also *Robinson v. Transcontinental Gas Pipe Line Corp.*, 421 F.2d 1397 (5th Cir.), *cert. denied*, 398 U.S. 905, 90 S.Ct. 1695, 26 L.Ed.2d 64 (1970). The Supreme Court long ago approved the *Jackson*-type presumption of consent:

> But, by accepting the sum awarded for the land actually taken, [the property owners] have lost the right to insist that the petition [of condemnation] was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled . . . .

Winslow v. Baltimore & Ohio Railroad Co., 208 U.S. 59, 62, 28 S.Ct. 190, 191, 52 L.Ed. 388 (1908).

[2] Appellant asserts that the only way he could receive a return on his investment, *i. e.*, just compensation under the Fifth Amendment, pending litigation and in light of the immediate use of his land, is by taking down the initial award. The Texas Supreme Court recently announced, however, that interest computed from the day of the taking is a proper element of the final award under Art. 3265. *Brunson v. State*, 444 S.W.2d 598 (Tex.Sup. Ct. 1969).

[3] The Supreme Court has on numerous occasions held that the "necessity and expediency" surrounding the taking of property is a legislative rather than a judicial question, and therefore "quick taking" without a prior hearing is consistent with due process. *Dohany v. Rogers*, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904 (1930); *Georgia v. Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 (1924); *Joslin Manufacturing Co. v. Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923); *Bragg v. Weaver*, 251 U.S. 57, 40 S.Ct. 62, 64, L.Ed. 135 (1919). See *2,953.15 Acres of Land v. United States*, 350 F.2d 356 (5th Cir. 1965).

[4] One practical effect of this procedure is to require the land owner to initiate any hearing on the validity of the taking, but this aspect of the Texas eminent domain laws has been held to be compatible with due process. *Joiner v. City of Dallas*, 380 F.Supp. 754, 772 (N.D.Tex.), *aff'd*, 419 U.S. 1042, 95 S.Ct. 614, 42 L.Ed.2d 637 (1974). Even when a condemnee accepts the award and is foreclosed from challenging the validity of the condemnation,

he may pursue his due process right to receive just compensation. *State v. Jackson, supra.*

We affirm the district court's dismissal of the plaintiff's suit on the ground that he is foreclosed from challenging the validity of the taking. By this disposition, we need not address appellees' arguments on the issues of laches and abstention, nor appellant's nonconstitutional arguments on statutory interpretation and just compensation.

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

February 25, 1976

TO ALL COUNSEL OF RECORD

No. 75-2874—Dr. Don M. Smart v. Texas Power and Light Company, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

by Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. S. L. Lewis
Mr. Frank M. Ryburn, Jr.
Mr. David Thomas

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1700

DR. SCOTT SMART, *Petitioner*,

v.

TEXAS POWER AND LIGHT COMPANY, ET AL., *Respondents*.

ADDENDUM OF EXHIBITS OF JUDGMENT OF THE DISTRICT COURT, COURT OF APPEALS, FIFTH CIRCUIT AND ORDER DISPOSING OF PETITION FOR REHEARING

S. L. LEWIS
5614 Richmond Street
Dallas, Texas 75206
(214) 823-2305

Counsel for Petitioner

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

DR. SCOTT SMART

V.

TEXAS POWER AND LIGHT CO. AND J. E. ABERNATHY

CA 3-74-171-B

ORDER OF DISMISSAL

The Supreme Court of the United States having on May 12, 1975, vacated the order of the three-judge court before which the above cause was heard and having remanded the case to the United States District Court for the Northern District of Texas "so that a fresh order may be entered from which a timely appeal may be taken to the United States Court of Appeals," the following order is therefore entered.

After due consideration of the pleadings, exhibits, admissions, and briefs filed in the above numbered and styled cause, the court is of the opinion that the plaintiff does not have standing to bring this suit. Standing would have to be predicated on some right in the plaintiff to take part in the condemnation proceedings instituted in Texas State Court in Collin County on September 1, 1970, since this suit is based on a challenge to the constitutionality of the statutes under which that condemnation took place. Legal right to take part in the condemnation proceedings

could vest only on proper notice to Texas Power and Light that the plaintiff had an interest in the land in question. No notice came to the defendant, however.

Proper notice could have come from two sources. The first would be notice through public record; and the second would be notice imputed to Texas Power and Light through knowledge of an agent gained while acting in the principals' business.

It can be seen from the record that notice through public documents showed no ownership in plaintiff Dr. Scott Smart at the time the condemnation proceedings were instituted on September 1, 1970. Ownership of the land in question was in the name of Dr. Don Smart, Scott Smart's brother. The correction deeds filed on March 27, 1973 can of course have no legal effect upon proceedings which took place two and one-half years earlier.

The other route by which plaintiff claims notice to have come to Texas Power and Light is through J. E. Abernathy, an agent of Texas Power & Light. Abernathy acted as attorney to TP&L in the condemnation suit, and he had also been the attorney for the people who sold the land in question to Dr. Don Smart in December, 1969. It is contended that notice was imputed to TP&L through the knowledge of J. E. Abernathy regarding the details of that land transaction.

As a general rule, knowledge of an agent acquired in the performance of his principal's work is imputed to the principal. *Odom v. Insurance Company of State of Pennsylvania,* 441 S.W.2d 584 (Tex. Civ. App. — Austin

1969), aff'd, 455 S.W.2d 195 (1970). However, Texas follows a limited view of imputation where an agent gains knowledge which may relate to the work of his principal, where such knowledge comes to the agent in business outside that of the principal. *Security State Bank of Pearsall v. Cunningham,* 296 S.W. 678 (Tex. Civ. App. — Eastland 1927); *Merrill v. Southwest Telegraph and Telephone,* 73 S.W. 422 (Tex. Civ. App. — 1903), writ ref'd; *Lane v. DeBode,* 69 S.W. 437 (Tex. Civ. App. — 1902). Secret equities within the knowledge of an agent, when gained outside the scope of the principal's business, cannot be imputed to the principal. *Taylor v. Taylor,* 29 S.W. 105 (Tex. Sup. Ct. 1895). Therefore, if this case presents a situation where Abernathy knew of an interest of Dr. Scott Smart in the land which was condemned, that would be insufficient to charge the defendant Texas Power and Light with knowledge of that interest.

Further knowledge through notice to an agent is asserted by the plaintiff. TP&L admitted in evidence the fact that Abernathy imparted his knowledge of the sales contract in the sale of the land to Don Smart to an appraiser of TP&L. However, the sales contract, and all other documents which would necessarily have come to Abernathy's attention in acting as attorney in the sale of the land, show no interest of Scott Smart in the property which was condemned.

On every theory put forth by the plaintiff attempting to place in TP&L knowledge of Dr. Scott Smart's alleged interest in the land, the proof fails. The court is therefore bound to refrain from deciding any issues attempted to

be brought before it in this suit because of lack of standing of the plaintiff to have brought it. It is therefore ORDERED, ADJUDGED, and DECREED that this case be and is hereby DISMISSED.

Signed this the 17 day of June, 1975.

SARAH T. HUGHES
United States District Judge

Dr. Scott SMART, Plaintiff-Appellant,

v.

TEXAS POWER AND LIGHT COMPANY et al.,
Defendants-Appellees,

State of Texas, Intervenor.

No. 75-3304
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

Owner of an undivided one-quarter interest in property subject to condemnation proceedings pending before the Texas state courts filed suit challenging on constitutional and other grounds the state condemnation proceedings. The United States District Court for the Northern District of Texas, at Dallas, Sarah Tilghman Hughes, J., dismissed the suit for want of standing, and plaintiff appealed. The Court of Appeals held that where the interest of plaintiff in the property subject to the state condemnation proceedings was not recorded until two and one-half years after the commencement of said proceedings, and where the condemnor had no knowledge of plaintiff's interest in the land, plaintiff had no right to take part in the condemnation proceedings and thus lacked standing to bring the instant federal suit.

Affirmed.

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*Rule 18, 5 Cir., see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

Constitutional Law 42(2)
Eminent Domain 242

Where the one-quarter interest of plaintiff in certain property subject to condemnation proceedings pending before the Texas state courts was not recorded until two and one-half years after the commencement of the proceedings, and where the condemnor had no knowledge of plaintiff's interest in the land, plaintiff had no right to take part in the condemnation proceedings and thus lacked standing to bring federal suit challenging the condemnation proceeding on constitutional and other grounds.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY, MORGAN and RONEY, Circuit Judges.

PER CURIAM:

Plaintiff-appellant holds an undivided one-quarter interest in certain property subject to condemnation proceedings now pending before the Texas state courts. His interest was not recorded until two and one-half years after the commencement of the proceedings. Plaintiff in this suit challenges on constitutional and other grounds the state condemnation proceedings, to which he was not a party. His suit was dismissed for want of standing. The district court observed that standing is predicated on some right in the plaintiff to take part in the condemnation proceedings. Legal right to take part depends on proper notice to appellee Texas Power and Light Company that the plaintiff had an interest in the land. The facts of this case, the court held, do not support the argument that Texas Power and Light Company had knowledge of Plaintiff's interest in the land. We agree, and affirm dismissal for lack of standing.

See a companion suit brought by Dr. Don Smart, the brother of the plaintiff here, Dr. Scott Smart, concerning constitutional challenges to the same condemnation proceeding. *Smart v. Texas Power and Light Company et al.*, — F.2d — (5th Cir. 1975).

Affirmed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

February 25, 1976

TO ALL COUNSEL OF RECORD

No. 75-3304—Dr. Scott Smart vs. Texas Power and Light Company, ET AL; State of Texas

---

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

by Susan M. Gravors
Deputy Clerk

/smg

cc: Mr. S. L. Lewis
Mr. Robert E. Burns
Mr. David R. Thomas

Supreme Court, U.
FILED
JUN 18 197

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1700

* * *

DR. SCOTT SMART,

Petitioner

V.

TEXAS POWER AND LIGHT COMPANY, ET AL,

Respondents

* * *

REPLY OF RESPONDENT THE STATE OF TEXAS TO THE PETITION FOR WRIT OF CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

WATSON C. ARNOLD
DUDLEY FOWLER
Assistant Attorneys General

DAVID R. THOMAS
Assistant Attorney General
2930 Turtle Creek Plaza
Suite 114
Dallas, Texas 75219

Attorneys for Respondent
The State of Texas

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 75-1700

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DR. SCOTT SMART,

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V.

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Respondents

* * *

REPLY OF RESPONDENT THE STATE OF TEXAS TO THE PETITION FOR WRIT OF CERTIORARI

* * *

The State of Texas was granted leave to intervene in this cause by the United States District Court for the Northern District of Texas for the purpose of preserving and defending the constitutionality of Texas statutes the Petitioner sought to have declared unconstitutional. Petitioner has challenged the constitutionality of Articles 3264 *et. seq.* of the Texas Civil Statutes, which provide the procedure for exercise of the power of eminent domain in Texas and Article 1436 of the Texas Civil Statutes, which delegates to gas and electric utility companies operating in Texas the authority to exercise the power of eminent domain. The State of Texas retains its interest in this aspect of the litigation because the Petition for Writ of Certiorari seeks review of the decision of the Court of Appeals for the Fifth Circuit denying Petitioner's standing to maintain his action challenging the enumerated State statutes.

QUESTION PRESENTED

It is respectfully suggested that the question presented for review herein is whether the Court of Appeals correctly affirmed the District Court's dismissal of Petitioner's suit on the ground that he lacked standing to maintain a federal action challenging the validity of an eminent domain proceeding pending in State District Court.

STATEMENT OF THE CASE

The eminent domain proceeding involving Petitioner's property is currently pending in the 199th Judicial District Court of Collin County, Texas. At the time the proceeding was initiated before Special Commissioners on September 1, 1970, public documents showed that Petitioner's brother, Dr. Don Smart, a resident of Texas, held title to the property. The Petition for Condemnation recognized Dr. Don Smart as owner. Petitioner, Dr. Scott Smart, was not in physical possession of the property at the time, nor does he now claim to have been in possession. Instead, Petitioner claims that in 1969 he received by unrecorded deed an undivided one-quarter interest in the property from Dr. Don Smart. With record title in the name of Don Smart when the condemnation action was instituted, full property interests became subject to the proceeding, including Petitioner's interest. Petitioner first recorded instruments showing the property interest he had received from his brother on March 27, 1973, over two years after the proceeding was commenced. Petitioner has not sought to intervene in the State proceeding.

Texas Power and Light Company, condemnor, presently is in possession of the property in question by virtue of Article 3268, Texas Revised Civil Statutes, which permits a condemnor to take possession of

condemned land pending litigation upon payment to the landowner of the award against condemnor or deposit of the same amount in court subject to order of Defendant. The award was paid by Texas Power and Light Company, and withdrawn by Dr. Don Smart, Petitioner's brother. An appeal of the award to the State Court kept the proceeding alive. Jurisdiction over the property interests remains with the State Court.

ARGUMENT AND AUTHORITIES

Respondent agrees with the federal courts below that Petitioner lacks standing to initiate and maintain this litigation in federal court. Petitioner inaccurately depicts the lower court decisions as unauthorized exercises in federal court abstention. Instead, the courts correctly held that Petitioner's standing in this suit must be predicated on a right to take part in the State condemnation proceedings and, because Respondent (condemnor), Texas Power and Light, did not have notice of Petitioner's interest in the property until over two years after the commencement of the condemnation proceedings, Petitioner had no such legal right.

In addition, Respondent urges that this is not a suit in which this Court should exercise its right of review by Writ of Certiorari. The question of Petitioner's standing to take part in the condemnation proceedings is a question of State law. Petitioner has steadfastly refused to attempt to become a party in the appeal presently before the State Court having jurisdiction over the property interests in question and thereby has refused to permit State Court adjudication of the issue. Prosecution of Petitioner's suit in federal court would result in a needless multiplicity of lawsuits.

CONCLUSION

For the reasons set out above, Respondent

respectfully urges this Court to deny Petitioner's Writ of Certiorari.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

WATSON C. ARNOLD
DUDLEY FOWLER
Assistant Attorneys General

DAVID R. THOMAS
Assistant Attorney General
2930 Turtle Creek Plaza
Suite 114
Dallas, Texas 75219

Attorneys for Respondent
The State of Texas

CERTIFICATE OF SERVICE

I, Dudley Fowler, a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of June, A.D. 1976, I have served three (3) copies of the foregoing Reply of Respondent the State of Texas to the Petition for Writ of Certiorari of Dr. Scott Smart by U. S. Mail, postage paid, on the following counsel at the addresses shown:

Mr. S. L. Lewis
Attorney at Law
5614 Richmond Street

Dallas. Texas 75206
Counsel for Petitioner,
Dr. Scott Smart

Mr. Frank M. Ryburn, Jr.
Burford, Ryburn & Ford
Attorneys at Law
1511 Fidelity Union Life Building
Dallas, Texas 75201
Counsel for Respondents,
Texas Power & Light Company,
J. E. Abernathy and
the Honorable Tom Ryan,
Judge of the 199th Judicial
District Court of Collin County, Texas.

DUDLEY FOWLER
Assistant Attorney General

Supreme Court, U. S.
FILED
JUN 18 1976
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1700

DR. SCOTT SMART,

Petitioner,

v.

TEXAS POWER & LIGHT COMPANY, et al.,

Respondents.

BRIEF OF TEXAS POWER & LIGHT COMPANY, ET AL., RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK M. RYBURN, JR.
1511 Fidelity Union Life Bldg.
Dallas, Texas 75201
214/741-5811

Counsel for Respondents Texas Power & Light Company, J. E. Abernathy and Hon. Tom Ryan

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

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In the

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DR. SCOTT SMART,

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TEXAS POWER & LIGHT COMPANY, et al.,

Respondents.

BRIEF OF TEXAS POWER & LIGHT COMPANY, ET AL., RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray this Honorable Court to deny the Petition for a Writ of Certiorari for the reason that the judgment below is correct, just, and supported by an unbroken legion of decided cases in point, including cases heretofore decided by this Honorable Court.

PREFACE

The Petition for Writ of Certiorari is yet another chapter in a tome of harassing, vexatious and frivolous attempts (first commenced over twenty years ago in 1955) by Petitioner or his

attorney to burden the courts with their disagreement with the philosophy that public service corporations have properly been granted by the State the power to take private property for a public purpose upon the payment of just compensation.

In 1955, plaintiff's attorney, S. L. Lewis, challenged the authority of Texas Power & Light Company, Respondent herein, to survey his land preparatory to its filing a condemnation action. The Texas Court of Civil Appeals affirmed an injunction granted by the trial court restraining Lewis from interfering with the survey. *Lewis v. Texas Power & Light Company,* 276 S.W. 2d 950 (Tex.Civ.App. 1955, error ref'd, n.r.e.).

During the pendency in the state courts of the Lewis condemnation suit, referred to above and involving the same tract of land, S. L. Lewis, on behalf of his sister, brought an action in the United States District Court against Texas Power & Light Company and its parent company challenging the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Baber v. Texas Utilities Company,* et al., 128 F.Supp. 753 (N.D.Tex. 1955), aff'd 5 Cir., 228 F.2d 665 (1956).

In 1972, Petitioner's attorney, S. L. Lewis, instituted an action in the United States District Court against Texas Power & Light Company, its parent and associated companies, and substantially all other electric and gas utility companies in Texas, again attacking the validity of the Texas condemnation laws. The 5th Circuit affirmed the trial court's dismissal of the action. *Lewis v. Texas Power & Light Company, et al.,* 5 Cir. 462 F.2d 1318 (1972).

While the above case, *Lewis v. Texas Power & Light Company,* was pending in the 5th Circuit and before its decision, Lewis filed in the U.S. Supreme Court his petition for Writ of Mandamus and in the alternative for Writ of Certiorari against the Chief Judge of the 5th Circuit and the trial judge, seeking reinstatement of the case on the trial docket. This Court denied the motion. *Lewis v. John R. Brown, Chief Judge, et al.,* 404 U.S. 819, 92 S.Ct. 74, 30 L. Ed. 119 (1971).

In 1972, Don Smart, represented by the same S. L. Lewis who instigated the previous actions, brought suit against Texas Power & Light Company and the Governor and Attorney General of Texas, again alleging the invalidity of the Texas condemnation laws in regard to a condemnation suit filed in Collin County, Texas, in 1970. The action of the trial court in dismissing the action was affirmed by the 5th Circuit. *Don M. Smart v. Texas Power & Light Company, et al,* 5 Cir., 525 F.2d 1209 (1976). From such action, plaintiff has recently petitioned for a Writ of Certiorari from this Court.

Later in 1972, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U. S. District Court against the Dallas County Sheriff and his deputies, a Dallas County District Attorney, the Dallas County Criminal Judge and the Rockwall County District Judge in whose Court the 1972 Don Smart condemnation proceeding was pending, alleging false arrest in connection with Smart's allegedly interfering with the service of process in the condemnation proceedings. The 5th Circuit affirmed a judgment against the plaintiff. *Nancy Gayle Smart v. Jones,* 5 Cir., 493 F.2d 663 (1974), reh. den., 5 Cir., 495 F.2d 1372 (1974). This Court denied petition

for Writ of Certiorari, 419 U.S. 1090, 95 S.Ct. 681, 42 L.Ed.2d 882 (1974), and denied petition for rehearing, 420 U.S. 939, 95 S.Ct. 1151, 43 L.Ed.2d 417 (1975).

In 1973, Don Smart, represented by S. L. Lewis, brought a civil rights action in the U.S. District Court against the Dallas County Sheriff and his deputies, the District Attorney and his assistants, and Texas Power & Light Company and its president and its attorney, alleging the invalidity of the Texas condemnation laws and false arrest for allegedly interfering with the service of process upon him in the condemnation suit involved in the instant controversy in which he has petitioned this Court for a Writ of Certiorari. The trial court granted defendant's motion for summary judgment, and upon plaintiff's appeal, the 5th Circuit affirmed. *Don Smart v. Jones, et al*, 5 Cir., 530 F.2d 64 (1976). (Past history indicates that Plaintiff will shortly file a Petition for Writ of Certiorari in that case).

In 1974, Scott Smart, the brother of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its attorney and the District Judge of Collin County, Texas, in which the Don Smart condemnation suit was pending, alleging the invalidity of the Texas condemnation laws and that the Collin County proceedings were void because of his non-joinder as a party. The trial court dismissed the action because of Scott Smart's lack of standing by reason of his claim under a conveyance which was unrecorded until 2½ years after commencement of the Collin County proceedings. The 5th Circuit affirmed the dismissal. *Scott Smart v. Texas Power & Light Company, et al*, 5 Cir., 525

F.2d 1211 (1976). The instant proceeding involves Scott Smart's petition to this Court for a Writ of Certiorari.

Later in 1974, Nancy Gayle Smart, wife of Don Smart, represented by S. L. Lewis, filed an action in the U.S. District Court against Texas Power & Light Company and its president and attorney, alleging the invalidity of the Texas condemnation laws and deprivation of her constitutional rights, said action being based upon the same facts and occurrence as she had alleged in her previous action against the Dallas County Sheriff, et al. Defendants' motion to dismiss this action on the ground of *res judicata* and collateral estoppel is pending in the trial court. *Nancy Gayle Smart v. Texas Power & Light Company, et al*, No. CA3-74-870-F in the U.S. District Court for the Northern District of Texas, Dallas Division.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is inaccurate and misleading. It is designed to leave the impression that back in 1970 Texas Power & Light Company illegally "took" a power line easement across Petitioner's land without bothering to sue him or pay thim any money. As the opinion of the Court of Appeals in this case states, as well as the Order of Dismissal of the District Court below, the alleged interest of the Petitioner in the property in question was not made known until 1973, two and one-half years after the commencement of condemnation proceedings against Don Smart (Petitioner's brother) and others. (See Opinions in Addendum of Exhibits on file herein).

The Courts below did not reach the constitutional questions

raised by Smart and did not pass upon those questions because Smart had no standing to raise the same.

REASONS FOR DENYING THE WRIT

I

Smart was without standing in the United States District Court to attack the constitutionality of Articles 1435 and 1436 and Articles 3264 through 3267 of the Texas Civil Statutes because no property interest of Smart was or is being sought by exercise of the power of eminent domain. In addition, there are good and sufficient remedies in law and in equity readily available to Smart which he may assert in the United States District Court or in other courts of competent jurisdiction to protect his property rights or seek redress for injuries to same that do not invoke any of the provisions of the Texas statutes noted above.

Texas Power & Light Company neither sought nor seeks any property interest of Smart. It has already secured an easement from all persons who, according to the Deed Records of Collin County, Texas, owned the land in 1970, being the fee owner, Don Smart (Smart's brother), the lienholders and the tenant. The fact that Smart may have acquired an interest in the land in 1973, long after Texas Power & Light Company's electric transmission line had been built over the land, or that for the first time in 1973 he revealed his alleged ownership, is of no consequence.

The facts are these. On September 1, 1970, the Company filed its condemnation suit for an easement for electrical facilities against Don M. Smart (the brother of *Scott Smart*, Petitioner), owner of record title, Eugene Lindsey, Ruby Lindsey and Arlie Lindsey, lienholders, and Dwight Crigger, tenant. On October 29, 1970 the three special commissioners appointed by the County Judge held their hearing and fixed the amount of damages to the land at $34,000 in their award. On or about November 5, 1970, Don M. Smart filed his written objections to the award in which he raised *no* constitutional objections or questions. That suit remains pending in Collin County, Texas, now being in the state district court. It is interesting to note that Don Smart recites in his objections that the other defendants "have assigned all their interest in this litigation to Don M. Smart." The foregoing facts are set forth in the certified copies of court papers attached to the Motion to Dismiss filed in the trial court by Texas Power & Light Company. (R., pp. 150-164)

At the time the suit was filed, record title to the land was solely in the name of *Don* M. Smart, as shown by certified copies of the four original deeds conveying title to "Don M. Smart," all dated in 1969 and all filed for record on January 8, 1970. (R. 371-387) These are the same four deeds, showing the same recording data, as are noted as being corrected in the four "correction" deeds executed in 1973 which are shown as exhibits 7, 8, 9 and 10 in Plaintiff's Request for Admissions filed in the trial court. (R. 20-123)

At the time the condemnation suit was filed, Petitioner *Scott* Smart did not appear as an owner of the property according to the deed records of Collin County. Neither Texas Power & Light Company nor its employees, agents or attorneys were aware of his existence, and there is nothing in the record of this case to indicate otherwise.

Smart seems to be asserting a prior interest in the land and to be imputing knowledge to Texas Power & Light Company of such interest by virtue of the four correction deeds referred to above. As the acknowledgments on the deeds indicate, these deeds were executed and acknowledged in March and April, 1973, and were filed and recorded in April, 1973, two and one-half years after the condemnation suit was filed and two years after Don Smart and the lienholders, on May 31, 1971, withdrew the sum of $34,000 deposited into the registry of the court by Texas Power & Light Company.

The four correction deeds recite that their purpose is to correct legal descriptions, the consideration evidenced by notes, and "to show the legal ownership . . . as of December 31, 1969," the latter language apparently being an *ex post facto* effort to backdate the one-fourth interest of Scott Smart from 1973 to 1969. We call attention to the fact that the words "as of December 31, 1969" were interlined or inserted at some time after the deeds were originally prepared. Plaintiff's Exhibit No. 9 attached to Request for Admission.

It is difficult to believe that Scott Smart did not receive any benefit from the $34,000 deposit which was withdrawn in 1971, either by its application to reduce the indebtedness on the property or more directly through payment to his brother. Under the law of the State of Texas, Don Smart, by drawing down the $34,000, has foreclosed his right to challenge the validity of the proceedings. *State v. Jackson,* 388 S.W.2d 924 (Tex.Sup., 1965); *United States ex rel. T.V.A. Powelson,* 319 U.S. 266, 63 S.Ct. 1074, 87 L.Ed. 1390; *Luby v. City of Dallas,* 396 S.W.2d 192 (Tex.Civ.App. writ ref. n.r.e.). The present

suit by Scott Smart constitutes an indirect effort on his part to do what Don Smart cannot do directly in the various other suits he has filed.

The condemnation suit in Collin County, Texas, is still pending at this time. If Petitioner is correct that he has a justiciable interest in that action, he can intervene in the same and assert his rights—or he may choose to proceed against his brother for money.

In any event under the legal principles established by this Court and under the facts of this case, Petitioner had no standing to bring this suit in a federal district court. A comprehensive discussion of standing, as well as justiciable interest in general, is found in *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed. 947, 88 S.Ct. 1942 (1968).

II

The dismissal of Smart's suit is additionally correct under the doctrine of laches. Smart waited from the institution of condemnation proceedings in 1970 and from construction of the transmission line in 1971 before filing the present action in 1974. At no time prior to 1974 did he challenge Respondent's right to construct its line. (R., pp. 131-135, 151-152) Under these factual circumstances the doctrine of laches is applicable in the case at bar. *Robinson v. Transcontinental Gas Pipe Line Corporation* (D.C.Ga. 1969) 306 F.Supp. 201, 208, aff'd., *Id.,* 5 Cir., 421 F.2d 1397 (1970) cert.den. 398 U.S. 905. *Northern Pacific Railroad Co. v. Smith,* 171 U.S. 260, 271-275, 18 S.Ct. 794, 43 L.Ed. 157, 161-163 (1898); *Lacy v. United States,* 5 Cir., 216 F.2d 223, 225 (1954); and *Dickinson v.*

Brown-Crummer Inv. Co., 10 Cir., 137 F.2d 615, 618 (1943).

Laches provides yet another reason for the denial of the Writ.

III

Because Petitioner cites no authorities bearing upon the validity of the Texas condemnation statutes and whether they meet the tests of due process, we will not do so. In this regard, however, reference is made to arts IV, V and VI of "Respondent Texas Power & Light Company's Brief In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" being filed in the case of *Dr. Don M. Smart v. Texas Power & Light Company, et al*, in which case a Petition for a Writ of Certiorari is now pending in this Court.

CONCLUSION

There is no merit to Petitioner's Petition for Writ of Certiorari, any more than there was any merit to the contentions made in the series of cases described in the Preface, *supra*. The judgments of the courts below are correct and just.

WHEREFORE, Respondents pray this Honorable Court to deny a Writ of Certiorari in this case.

Respectfully submitted,

FRANK M. RYBURN, JR.
1511 Fidelity Union Life Bldg.
Dallas, Texas 75201
214/741-5811
Counsel for Respondents Texas Power & Light Company, J. E. Abernathy and Hon. Tom Ryan

CERTIFICATE OF SERVICE

I, Frank M. Ryburn, Jr., a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing "Brief of Texas Power & Light Company, et al., Respondents, in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" by mailing three copies of same by United States Mail, postage prepaid, on June 17, 1976, to each, Mr. S. L. Lewis, 5614 Richmond Street, Dallas, Texas 75206, counsel of record for Petitioner, and Mr. David R. Thomas, Assistant Attorney General of Texas, 2930 Turtle Creek Plaza, Suite 114, Dallas, Texas 75219, counsel of record for Respondents Hon. Dolph Briscoe and Hon. John Hill.

Frank M. Ryburn, Jr.